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# Full of Hot Air: Why the Atmospheric Trust Litigation Theory Is an Unworkable Attempt to Expand the Public Trust Doctrine Beyond Its Common Law Foundations

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# FULL OF HOT AIR: WHY THE ATMOSPHERIC TRUST LITIGATION THEORY IS AN UNWORKABLE ATTEMPT TO EXPAND THE PUBLIC TRUST DOCTRINE BEYOND ITS COMMON LAW FOUNDATIONS

ANDREW BALLENTINE\*\*

*The issue of climate change has been a major feature in public discourse for more than twenty-five years and the debate has vociferously engaged scientists, politicians, and the general public. Climate change is impacting the local, state, national and global levels, ranging from the loss of coastal land in Massachusetts to the loss of permafrost in Alaska. The challenge to addressing the crisis that these climate change impacts are presenting has inspired various proposals, both legal and scientific. The 2012 case Alec L. v. Jackson has brought the issue of Atmospheric Trust Litigation and potential claims for injury due to climate change to the forefront. This article analyzes the Atmospheric Trust Litigation theory for its viability as a potential remedy to address the issue of climate change by looking at the potential obstacles presented by the Public Trust Doctrine.*

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\*\* Andrew (Andy) Ballentine is a student at the Florida A&M University College of Law and is expecting to graduate in May 2015. Thanks to Professor Randy Abate for his guidance and encouragement in the development of this article. This article is dedicated to my wife and children who are a constant source of joy and in gratitude for their patience.

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## INTRODUCTION

The issue of climate change has been a major feature in the news and public discourse for more than twenty-five years, and the debate has vociferously engaged scientists, the general public, and politicians.<sup>1</sup> Private individuals have sought to remedy alleged injuries on either a collective or individual basis.<sup>2</sup> The individual states have also sought redress of claims of actual or imminent injury through both the state and federal courts in the United States. Climate change is causing impacts on the local, state, national and global levels, ranging from loss of coastal land in Massachusetts to the loss of permafrost in Alaska.<sup>3</sup> The challenge to address the crisis that these climate change impacts are presenting has inspired various proposals, both legal and scientific.

The recently decided *Alec L. v. Jackson* case has brought the issue of Atmospheric Trust Litigation and potential claims for injury due to climate change to the forefront.<sup>4</sup> The Atmospheric Trust Litigation (ATL)

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<sup>1</sup> Richard Black, *A Brief History of Climate Change*, BBC NEWS (Sept. 20, 2013, 6:58 AM), <http://www.bbc.co.uk/news/science-environment-15874560>.

<sup>2</sup> See generally *Kanuk v. State*, No. 3AN1107474, 2012 WL 8262438 (Alaska Super. Ct. Mar. 16, 2012) (discussing the dismissal of an action in which the lower court denied the Plaintiff's request to declare the atmosphere as part of the public trust, which the State of Alaska has a fiduciary duty to manage, and that the State of Alaska has failed their duty by not engaging in rulemaking to reduce carbon emissions by 6%).

<sup>3</sup> *Id.*; See generally *Massachusetts v. EPA*, 549 U.S. 497 (2006).

<sup>4</sup> See generally *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012).

theory proposes that the avenue through which to address climate change is to expand the Public Trust Doctrine (PTD) to include the atmosphere.<sup>5</sup> This expansion seeks to hold state and federal governments responsible, under a fiduciary standard, for their actions, or inaction, related to the protection of the atmosphere and other matters subject to the PTD.<sup>6</sup> The courts have wrestled with the issue of expanding the basic premise of the PTD.<sup>7</sup> The courts have also looked at related resources under the PTD when analyzing cases.<sup>8</sup> Professor Richard Lazarus once described the efforts to expand the PTD in the following manner:

Commentators and judges alike have made efforts to ‘liberate,’ ‘expand,’ and ‘modify’ the doctrine’s scope, yet its basic focus remains relatively unchanged. Courts still repeatedly return to the doctrine’s historical function to determine its present role. When the doctrine is expanded, more often than not the expansions require tortured constructions of the present rather than repudiations of the doctrine’s past.<sup>9</sup>

This article discusses why the ATL theory is an unworkable attempt to expand the PTD beyond its common law foundation. Even if the court permitted the expansion of the PTD, the doctrines of Standing and Political Question should deny these claims unless modified into the more familiar form of private nuisance or public nuisance cases outside the scope of areas regulated by the EPA.

Part I of this article addresses the background of the PTD and ATL. Part II addresses the progression of the PTD, climate change litigation, and ATL, including a discussion of the policy considerations of these doctrines. Part III examines standing and the political question doctrine in PTD and ATL cases to determine the applicability of the doctrines to the plaintiff’s claims. This article concludes that the ATL theory can be utilized in jurisdictions where the legislature has previously provided a basis for the air or atmosphere as a part of the Public Trust; however, in jurisdictions where this has not occurred, the ATL theory seeks to circumvent

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<sup>5</sup> See generally *Adjudicating Climate Change* *infra* Part I.B; *Nature’s Trust* *infra* Part I.B.

<sup>6</sup> *Id.*

<sup>7</sup> See generally *Nat’l Audubon Soc’y v. Super. Ct.*, 33 Cal. 3d 419 (1983); *Marks v. Whitney*, 6 Cal.3d 251, 259-60 (Cal. 1971) (discussing the Public Trust as traditionally defined and how the trust has been expanded to include additional related rights).

<sup>8</sup> See generally *Geer v. Conn.*, 161 U.S. 519 (1896); see *infra* note 21.

<sup>9</sup> J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SOUTHEASTERN ENVTL. L.J. 223, 229 (2006) (citing Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 710-11 (1986)).

unfavorable political outcomes with legal actions, which runs afoul of non-justiciability limitations.

# I. CONCEPTUAL FOUNDATIONS OF THE PUBLIC TRUST DOCTRINE AND ATMOSPHERIC TRUST LITIGATION

## A. THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine in American jurisprudence traces its roots to the mid-1800s when the Supreme Court of the United States tackled the issue in two cases, *Martin v. Waddell's Lessee* and *Pollard's Lessee v. Hagan*.<sup>10</sup> These cases represent the origin of the concept that the absolute right to “navigable waters, and the soils under them, passed to the states upon admission to the union, for the ‘common use’ of the ‘people.’”<sup>11</sup> The PTD has developed almost primarily as an issue of state law, by virtue of the title passing to the states upon their admission to the union.<sup>12</sup>

While these cases helped define the initial scope of the doctrine, the roots of the PTD are traceable to England where the common law established “the King is the owner of all navigable rivers, bays, and shores below low water mark, and he owns them, not as trustee, but in full dominion and propriety.”<sup>13</sup> The King’s ownership of the land was subject to two limitations: “That these waters shall remain highways for passage and navigation;” and “[t]hat while they remain ungranted there is a common right of fishery therein.”<sup>14</sup> There is also a foundation for the PTD in Roman law as the Supreme Court discussed in *Idaho v. Coeur d’Alene Tribe of Idaho* by citing the Institutes of Justinian’s characterization of the public use of rivers and ports and their commonality.<sup>15</sup>

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<sup>10</sup> Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty?* 19 PUB. LAND & RESOURCES L. REV. 51, 54 (1998) (hereinafter *Timid Approach*).

<sup>11</sup> *Timid Approach*, *supra* note 10, at 54.; Cf. *Philips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (holding that the State gained title in fee simple to lands influenced by the tides even though they were not navigable at the time of Mississippi’s admission to the Union).

<sup>12</sup> *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1082 (D.C. Cir. 1984); *See also supra* note 5; Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 680-85 (discussing application of PTD in the federal system and citing to *Illinois Central* that the decision was a “judicial explication of state, rather than federal, law principles”) (hereinafter *The Public Trust Doctrine*).

<sup>13</sup> *Arnold v. Mundy*, 6 N.J.L. 1, 52 (1821).

<sup>14</sup> *Id.*

<sup>15</sup> *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997); *See Also* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 798 (2010) (hereinafter *Adapting to Climate Change*); *See generally* Edgar Washburn, Alejandra Núñez, *Is the Public Trust a Viable Mechanism to Regulate Climate*

American jurisprudence has departed from this absolute ownership. It has cast aside the trustee relationship, as established by English common law, in favor of “[a] public trust doctrine [that] holds...certain crucial natural resources are the shared, common property of all citizens [and] that [they] cannot be subject to private ownership and must be preserved and protected by the government.”<sup>16</sup> This departure from the English common law tradition is notable because the King’s absolute title permitted him to treat the land in any manner he wished,<sup>17</sup> subject to the limitations for navigation and fisheries, as opposed to the American common law tradition to which creates a “fiduciary obligation to protect such natural assets” to which the state is held.<sup>18</sup> The fiduciary duty has traditionally “functioned as a constraint on states’ ability to alienate public trust lands and as a limitation on uses that interfere with trust purposes.”<sup>19</sup> This fiduciary duty limitation is manifested in two manners: one is a constraint on the state legislature in terms of the laws enacted, and the other is the act of the state in conveying land subject to the PTD.<sup>20</sup>

### 1. Scope of the Public Trust Doctrine

In *Martin v. Waddell’s Lessee*, the Supreme Court provided the foundation for the PTD in American jurisprudence. The Court reasoned that “[w]hen the revolution took place, the people of each state became themselves sovereign; and in that character, held the absolute right to all their navigable waters, and the soil under them; for their own common use, subject only to the rights since surrendered by the constitution to the general government.”<sup>21</sup> The states’ ownership of the PTD land is subject to

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*Change?* 27 NAT. RESOURCES & ENV’T 23, 25 (Fall 2012) (hereinafter *Is the Public Trust*); JUSTINIAN, THE INSTITUTES, 1.2.1, 2.1.1 (T. Sandars trans. 1st Am. Ed. 1876); Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 27 CAL. W. L. REV. 239, 249-53 (1992) (hereinafter *Economic Perspective*).

<sup>16</sup> Patrick C. McGinley, *Climate Change and the Public Trust Doctrine*, 65 PLANNING & ENVIRONMENTAL LAW No. 8, p. 7 (August 2013) (Citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)).

<sup>17</sup> *Is the Public Trust*, *supra* note 15, at 25 (“The king held title to the soil beneath the sea and arms of the sea (navigable waters) in his sovereign capacity and could grant the beds of navigable waters into private ownership ...”).

<sup>18</sup> *Id.*; See generally *Geer*, 161 U.S. at 519; See also *The Public Trust Doctrine*, *supra* note 12, at 676-79 (discussing the applicability of the PTD to fish and wildlife resources).

<sup>19</sup> *Air Fla., Inc.*, *supra* note 12, at 1082-83.

<sup>20</sup> See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

<sup>21</sup> *Martin v. Waddell’s Lessee*, 41 U.S. 367 (1842); See *supra* note 5; See also *Adapting to Climate Change*, *supra* note 15, at 798-9; Washburn and Nuñez, *supra* note 15, at 25 (explaining how the Equal Footing doctrine operates such that “each subsequently admitted state acquired the beds of navigable waters in its sovereign capacity at statehood” subject to a federal law limitation that “the navigable waters that passed to the states under the equal footing doctrine are those that

federal government restrictions, but this does not result in the federal government being subject to the standard as the states.<sup>22</sup> Since the Supreme Court established the basis for the PTD, courts have wrestled with the issue of whether to expand the basic premise of the PTD and introduce new areas that may be subject to the doctrine.<sup>23</sup> Courts have also looked at related resources, such as the wildlife, and scientific endeavors when considering expanding upon the traditional lands, also known as “res communes,”<sup>24</sup> under the PTD.<sup>25</sup>

In *Air Florida, Inc.*, the Court referred to a series of cases in which the courts in California have expanded the PTD from the traditional water-related uses to include “swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands.”<sup>26</sup> The PTD has been utilized as a source of authority to seek damages for water-related harms when an oil spill causes waterfowl to be killed.<sup>27</sup> The basis of this authority was that “[u]nder the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources.”<sup>28</sup> The right instilled in the government did not “derive from ownership of the resources but from a duty owing to the people.”<sup>29</sup>

The expansion of the PTD has been adopted by some courts, but the judicial expansion has not exceeded the scope of navigable waters.<sup>30</sup>

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*are navigable-in-fact or are susceptible to being used, in their ordinary condition, as highways for commerce over which trade and travel are, or may be, conducted at the time of statehood.”[emphasis added]; See generally Robin Kundis Craig, A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust, 37 ECOLOGY L.Q. 53 (2010).*

<sup>22</sup> *Is the Public Trust*, *supra* note 15, at 25 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979)); *See generally* *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>23</sup> *Marks v. Whitney*, 6 Cal.3d 251, 259-60 (Cal. 1971) (discussing the Public Trust as traditionally defined and how the trust has been expanded to include additional related rights).

<sup>24</sup> *Geer*, 161 U.S. at 519 at 525 (discussing what was divided among men in private ownership and those things that remained in common ownership – “referred to by juriconsults [as] ‘res communes.’ These things included “the air, the water which runs in the rivers, the sea, and its shores).

<sup>25</sup> *See supra* note 16; *See generally Geer*, 161 U.S. at 519.

<sup>26</sup> *See supra* note 12.

<sup>27</sup> *Complaint of Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (discussing a cause of action for damages, statutory penalties, and cleanup costs where the defendant caused an oil spill in the Chesapeake Bay in 1976 that resulted in the death of approximately 30,000 migratory birds).

<sup>28</sup> *See supra* note 27.

<sup>29</sup> *See supra* note 17.

<sup>30</sup> *Is the Public Trust*, *supra* note 15, at 26 (citing to *Marks* and *Nat’l Audubon Soc’y v. Super. Ct.*, 33 Cal. 3d 419 (1983), as examples of the limits of the judicial expansion of Public Trust Doctrine).

Additionally, some states have expanded their definitions of navigable waters to include more waterways than would be included under the federal standard.<sup>31</sup> The addition of environmental rights in a state constitution or other statute should not be confused with an expansion of the common law PTD as that expansion is an exercise of the individual state's police power.<sup>32</sup> On the topic of expansion, Richard Lazarus contended that the strength of PTD "necessarily lies in its origins; navigable waters and submerged lands are the focus of the doctrine, and the basic trust interests in navigation, commerce, and fishing are the object of its guarantee of public access."<sup>33</sup>

## 2. Limitations on the State by the Public Trust Doctrine

There are two theories that courts have applied to restrict the state's treatment of the *res communes* of the PTD.<sup>34</sup> The first is that courts have imposed an affirmative duty upon the State to reasonably protect or conserve Public Trust resources, but this approach is in the minority.<sup>35</sup> Most courts have instead imposed limitations on State "actions that adversely affect the [Public Trust] concerns" and this has been further broken down into three approaches.<sup>36</sup> These approaches are as follows: (1) A requirement that the action at issue "satisfy a public trust purpose;" (2) a requirement that the State consider "adverse impact on the trust resource" before acting if the impact is "either minimal or necessary," and (3) that the action be specifically authorized by the legislature when it is being taken by the executive branch.<sup>37</sup>

The seminal case in PTD jurisprudence for the limitations on State action by the fiduciary duty imposed is *Illinois Central*.<sup>38</sup> In *Illinois Central*, the Court limited the ability of the Illinois state legislature to convey title of the lakebed of Chicago's harbor to the Illinois Central

<sup>31</sup> Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647-8 (1986) (hereinafter *Changing Conceptions*).

<sup>32</sup> *Is the Public Trust*, *supra* note 15, at 26.

<sup>33</sup> J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SOUTHEASTERN ENVTL. L.J. 223, 229 (2006) (citing Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 710-11 (1986)); *See generally* George P. Smith & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307 (2006).

<sup>34</sup> *Changing Conceptions*, *supra* note 31, at 650-51.

<sup>35</sup> *Compare Changing Conceptions*, *supra* note 31, at 650-51 with *Adjudicating Climate Change*, *infra* Part I.B and *Nature's Trust*, *infra* Part I.B.

<sup>36</sup> *Changing Conceptions*, *supra* note 31, at 650-51.

<sup>37</sup> *Id.*

<sup>38</sup> *See supra* note 20.



Railroad Company.<sup>39</sup> This limitation is due to the fact that the “public trust cannot be relinquished by the state, except as to parcels used in promoting the interest of the public and without the substantial impairment of the public interest in the remaining lands and waters.”<sup>40</sup> This limitation has been adopted in “virtually every state jurisdiction as a matter of state common law.”<sup>41</sup>

The pursuit of constraint by legal action has been seen time and time again to “stave off the greedy or harmful proposed uses of state water, waterbodies, watercourses, and their related resources” and provided “an effective tool for judicial oversight [of] ... private interests and complacent state agencies.”<sup>42</sup> This use of legal action has given rise to various theories utilized to protect the *res communes*. The Atmospheric Trust Litigation theory is the most recent example of this effort.

## B. ATMOSPHERIC TRUST LITIGATION

### 1. Domestic Application

ATL involves the notion that courts “can hold governments at the national and subnational level accountable for reducing carbon emissions” by virtue of the atmosphere being “characterized ... as one of the assets in the trust, shared as property among all nations of the world as co-tenants.”<sup>43</sup> The theory would hold governments at various levels responsible on a fiduciary basis for public trust *res* and seek court ordered relief for any violations of that duty.<sup>44</sup> Courts would essentially be ensuring that the other

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<sup>39</sup> See generally *supra* note 20. *Adapting to Climate Change*, *supra* note 165, at 801 (distinguishing private ownership of public trust doctrine lands is also subject to limitation based on the navigability of the waterway); *Is the Public Trust*, *supra* note 15, at 25 (discussing the limitation for private owners will vary from no limitation for owners of non-navigable waterways, to strict limitations on property rights that extend only to the waterway).

<sup>40</sup> See *supra* note 20, at 453; See also, *Is the Public Trust*, *supra* note 15, at 25.

<sup>41</sup> *Is the Public Trust*, *supra* note 15, at 25 (discussing *Ill. Cent. R.R. Co.* as an example of legal action to curtail the actions of the State legislature, as opposed to an agency, that had been complacent in its grant of land to the railroad company only to realize the error at a later date).

<sup>42</sup> *Timid Approach*, *supra* note 10, at 55.

<sup>43</sup> MARY CHRISTINA WOOD, *Atmospheric Trust Litigation*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 99 (William C. G. Burns & Hari M. Osofsky eds., 2011) (hereinafter *Adjudicating Climate Change*); See generally Hope M. Babcock, *The Public Trust Doctrine: What A Tall Tale They Tell*, 61 S.C. L. REV. 393 (2009) (discussing the reasoning behind using the PTD as a stopgap measure before positive law can be enacted); Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315 (2000).

<sup>44</sup> *Adjudicating Climate Change*, *supra* note 43, at 100; See also MARY CHRISTINA WOOD, NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 156-61, 221-22

branches of government are fulfilling their duties as trustee of the Public Trust.<sup>45</sup> The violation that the PTD seeks to have rectified is one where the trust has been used “as a prerogative for the advantage of government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.”<sup>46</sup>

The strategy, as a whole, would seek to apply the PTD or a country-specific derivation, as applicable, “toward enforcing planetary carbon reduction requirements, formulated to hold each government accountable for its share of the necessary reduction.”<sup>47</sup> The stratagem would be distinguishable in the United States domestic courts from those claims that sought relief under the various environmental statutes, such as the Clean Air Act.<sup>48</sup> The rationale for using the PTD, as opposed to other strategies, is three-fold.<sup>49</sup> First, the doctrine “is the most fundamental legal mechanism to ensure government safeguards natural resources necessary for public welfare and survival.”<sup>50</sup> Second, the PTD is more likely to be justiciable because “judicial enforcement of fiduciary obligations is necessary when the political branches abdicate their responsibility to protect the *res* of the trust.”<sup>51</sup> A third justification for the use of the doctrine is based on the human rights argument of a “right to life” and the doctrine being “a judicial tool to ensure that political branches of government protect the [right].”<sup>52</sup>

The fiduciary duty as trustee, under the PTD, to protect the *res* is not a duty that can be disclaimed.<sup>53</sup> The Public Trust is described as an “attribute of government” and thus the management of the trust is

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(discussing a multi-factor test for defining the *res* under the Nature’s Trust adaptation of the Public Trust doctrine and how the Atmospheric Trust Litigation theory approaches climate change for the *res* of the trust) (2013) (hereinafter *Nature’s Trust*).

<sup>45</sup> *Adjudicating Climate Change*, *supra* note 43, at 100; *Nature’s Trust*, *supra* note 44, at 14 (explaining how Nature’s Trust is another step in determining ownership for resources based on the Public Trust Doctrine and thus an obligation upon the government).

<sup>46</sup> *Adjudicating Climate Change*, *supra* note 43, at 102.

<sup>47</sup> *Adjudicating Climate Change*, *supra* note 43, at 100.

<sup>48</sup> *Id.* at 100.

<sup>49</sup> *Id.* at 100-03; *See also Nature’s Trust*, *supra* note 44, at 14.

<sup>50</sup> *Adjudicating Climate Change*, *supra* note 43, at 101.

<sup>51</sup> Mark Belleville & Katherine Kennedy, *Cool Lawsuits - Is Climate Change Litigation Dead After Kivalina v. Exxonmobil?*, 7 APPALACHIAN NAT. RESOURCES L.J. 51, 82 (2013) (citing the amicus law professors) (hereinafter *Cool Lawsuits*); *Nature’s Trust*, *supra* note 44, at 128 (explaining how the duty imposed on government by the public trust is discharged when the government’s conduct is “directed to no other end but the peace, safety, and public good of he people”).

<sup>52</sup> *See supra* note 47.

<sup>53</sup> *Adjudicating Climate Change*, *supra* note 43, at 103.

applicable to all government bodies.<sup>54</sup> While this traditionally has been the case, the concept of the PTD in American jurisprudence has always been “controversial...[due to] U.S. law favor[ing] ownership of natural resources as private property.”<sup>55</sup> This controversy centers around the fact that the PTD “treat[s] some resources as subject to a perpetual trust that forecloses private exclusionary rights.”<sup>56</sup> The beneficiaries of this trust are “present and future generations” thus enabling citizens to pursue enforcement of the government’s duty as the trustee of the trust.<sup>57</sup> The fiduciary duty sought to be enforced is one that requires a trustee to “protect the assets of the trust from damage.”<sup>58</sup>

The ATL theory seeks to analogize trust assets with transboundary trust assets, such as a waterway shared between states, or migratory birds that migrate across borders.<sup>59</sup> Under the ATL theory, the fiduciary duty is translated to the federal government from the state government when there is a national interest in the resource, such as under Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).<sup>60</sup>

In order to move forward, the theory presupposes a series of cases on an ATL basis that does not necessarily need to be brought in every jurisdiction.<sup>61</sup> Once a sufficient number of “precedent-setting lawsuits” create a “clear liability framework” then that can “spur necessary action on the political level nationally” and eliminate need for massive litigation to continue.<sup>62</sup> A declaratory judgment may also be sufficient to move the ball forward and become a “yardstick for political action.”<sup>63</sup> The declaratory

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<sup>54</sup> *Id.*; See also *Nature’s Trust*, *supra* note 44, at 16 (discussing how different views exist about the Public Trust, but that despite being a judicial tool the “doctrine’s fundamental applicability to the legislative and administrative branches”).

<sup>55</sup> *Cool Lawsuits*, *supra* note 51, at 82.

<sup>56</sup> *Id.*

<sup>57</sup> *Adjudicating Climate Change*, *supra* note 43, at 104.

<sup>58</sup> *Id.* at 105 (citing Restatement (Second) of Trusts §176 that states “The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.” [emphasis added]).

<sup>59</sup> *Adjudicating Climate Change*, *supra* note 43, at 106 n. 33; See also *Nature’s Trust* at 146-47; See generally J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?* 45 U.C. DAVIS L. REV. 915 (2012).

<sup>60</sup> *Adjudicating Climate Change*, *supra* note 43, at 107 (citing CERCLA, 42 U.S.C. § 9607(f) n. 40, as an example of co-trusteeship); See also *Nature’s Trust*, *supra* note 44, at 133-36 (discussing the status of the federal government as a co-trustee in management of the public trust). *Contra* *Martin v. Waddell’s Lessee*, 41 U.S. 367 (1842) (stating that the State’s succeeded Great Britain in sovereignty over their land, subject to the same restrictions as those imposed upon the King under British common law). For further discussion, see *infra* Part II.

<sup>61</sup> *Id.*

<sup>62</sup> *Adjudicating Climate Change*, *supra* note 43, at 113-14; See also *Nature’s Trust*, *supra* note 44, at 226-27 (discussing the types of actions that can be brought).

<sup>63</sup> *Adjudicating Climate Change*, *supra* note 43, at 115.

judgment may come from various levels of a sovereign, such as from a “municipal [judge], state court [judge], and federal [judge] to enforce the fiduciary obligation against the various levels of government.”<sup>64</sup> The carbon reduction plan may take various shapes, such as “carbon taxes, infrastructure projects, or transfer of public investment” and these may be outside the scope of judicial enforcement due to non-justiciability standards.<sup>65</sup>

## 2. Global Applications

For application of ATL on a global scale, the United Nations Framework Convention on Climate Change is cited as creating an obligation for the parties to “protect the climate system for the benefit of present and future generations...” and this is a way to require foreign sovereigns to comply with carbon emission reductions.<sup>66</sup> This obligation will position “nations...as sovereign co-tenant trustees of a shared atmosphere” and potential permit enforcement of the obligation to “protect the climate system.”<sup>67</sup> In order to accomplish the goal of carbon emission reduction, each sovereign would be attributed a reduced target goal and this goal could be “scaled down to each subnational jurisdictional level.”<sup>68</sup> This approach would spread the responsibility equally amongst the nations and allows for intra-nation divisions as well, with the goal of eliminating the “developed versus undeveloped world” rift in the current international regulation of climate change.<sup>69</sup> However, the theory continues to discuss the potential reality of “orphan shares,” which occur when a sovereign does not take responsibility for its share of liability to reduce carbon emissions.<sup>70</sup> These orphan shares would not be positioning sovereigns to take more than their share in the initial stages, but the theory creates a principle of inexcusability of orphan shares, in part or whole, and any significant

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<sup>64</sup> *Id.* at 118; *See also Nature's Trust*, *supra* note 44, at 145, 248-53 (discussing the common law's ability to adapt to changing circumstances and how a declaratory judgment is the foundation for Nature's Trust remedies).

<sup>65</sup> *Adjudicating Climate Change*, *supra* note 43, at 121.

<sup>66</sup> *Id.* at 109; *See also* United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107, 111 (1992), *available at* <http://unfccc.int/resource/docs/convkp/conveng.pdf>; *Cf. Nature's Trust*, *supra* note 44, at 335-342.

<sup>67</sup> *Adjudicating Climate Change*, *supra* note 43, at 109; *See generally* David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711 (2008) (discussing various approaches to environmental human rights, as an expansion of the PTD, and how other nations have dealt with this issue).

<sup>68</sup> *Adjudicating Climate Change*, *supra* note 43, at 111.

<sup>69</sup> *Id.* at 112.

<sup>70</sup> *Id.* at 113.

orphan share “is likely to defeat efforts to reduce emissions adequately in the short time frame needed.”<sup>71</sup>

Once a nation has been successfully transitioned to accepting its atmospheric fiduciary obligation, then actions may be “brought by one sovereign trustee against another for failure to maintain common property” as an effort to ensure compliance between sovereign nations.<sup>72</sup> This is because governments’ approach to climate change has been “perceived as a matter of political discretion, not obligation” and in order to accomplish the goals of ATL there will need to be a significant shift in societal emphasis in “moral, political, spiritual, economic, and legal framework.”<sup>73</sup>

## II. EXISTING LEGAL FRAMEWORK OF PUBLIC TRUST DOCTRINE AND ATMOSPHERIC TRUST LITIGATION

To evaluate the ATL theory’s prospects for success, case law that has developed in and around the question of PTD and climate change must be considered.

### A. THE EVOLUTION OF THE PUBLIC TRUST DOCTRINE

*Illinois Central Railroad Company* is the seminal case on the issue of what a government can and cannot do in relation to lands that are subject to the PTD and the inalienability rule that locks resources into public ownership.<sup>74</sup> In *Illinois Central*, at issue was the controversy regarding the “control of the bed of Lake Michigan east of downtown Chicago.”<sup>75</sup> There were various entities clamoring to establish their claim of controlling interest so the Court would grant them the title to the lands on which the lakefront of Chicago, which was formerly lakebed but now is currently occupied by railroad tracks among other structures to which the railroad

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 114; See also *Nature’s Trust*, *supra* note 44, at 226-27 (discussing the capability of a sovereign to pursue action against another sovereign for committing waste of an asset in the Nature’s Trust).

<sup>73</sup> *Adjudicating Climate Change*, *supra* note 43, at 123; See generally Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26A STAN. ENVTL. L.J. 3 (2007); Anne C. Dowling, “Un-Locke-ing” a “Just Right” Environmental Regime: Overcoming the Three Bears of International Environmentalism—Sovereignty, Locke, And Compensation, 26 WM. & MARY ENVTL. L. & POL’Y REV. 891 (2002).

<sup>74</sup> Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800 (2004) (hereinafter *American Public Trust*); See also *Nature’s Trust*, *supra* note 44, at 320-23 (discussing the public trust property and restraints on privatization).

<sup>75</sup> *American Public Trust*, *supra* note 74, at 800.

claims title.<sup>76</sup> In 1851, the Illinois legislature granted certain lands, subject to a previous act of Congress, to the railroad company for the purpose of creating a railroad that would serve as a “public highway for the use of the government of the United States” and also serve the State of Illinois and City of Chicago.<sup>77</sup> However, the issue arose due to the railroad company constructing the railroad on land that was reclaimed from the waters of Lake Michigan, without acquisition of those lands beyond those granted by an ordinance from the City of Chicago and the act of the State Legislature.<sup>78</sup> In 1873, the State Legislature repealed the grant of the land to the Illinois Central Railroad Company in order to use the land for a more modern purpose.<sup>79</sup>

In discussing the grant of the bed of Lake Michigan to the railroad company, the Court discussed the importance of the harbor of Chicago to the people of the State of Illinois and asserted that “depriving the state of control...and plac[ing] the same in the hands of a private corporation...is a proposition that cannot be defended.”<sup>80</sup> The character of the property is one of a public nature that is held “by the whole of the people for purposes in which the whole people are interested.”<sup>81</sup> The submerged land is “held by the people of the state in trust for the common use...”<sup>82</sup> The Court reasoned that “the state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them ... without impairment of the public interest...than it can abdicate its police powers in the administration of government and the preservation of the peace.”<sup>83</sup>

The Court determined that the State Legislature had acted in a manner analogous to licensing when the original grant was provided to the railroad to develop the land, which was in the public’s interest, and that by repealing the grant the Legislature had in essence terminated the license

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<sup>76</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 433 (discussing how the lands were attributed to the State of Illinois upon their admittance to the union and that as a matter of law “lands covered by tidewaters” are under the ownership of the State); *See generally* *State v. Central Vt. Ry.* 571 A.2d 1128 (Vt. 1989) (analogizing the Railway’s land as fee simple subject to condition subsequent, which was a restriction that the land be use for public purposes); *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356 (Mass. 1979) (holding that Lewis Wharf statutes gave grantees title to land below low water mark in fee simple, but subject to conditions subsequent that it be used for the public purpose for which it was granted).

<sup>77</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 435-445.

<sup>78</sup> *Id.* at 445.

<sup>79</sup> *The Origins of the Public Trust Doctrine* at 905-912.

<sup>80</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 454.

<sup>81</sup> *Id.* at 456.

<sup>82</sup> *Id.* at 459.

<sup>83</sup> *Id.* at 452-3.

previously granted.<sup>84</sup> The Court noted that as “a grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.”<sup>85</sup>

The issue in *National Audubon* revolved around a grant by the Division of Water Resources of the State of California for the City of Los Angeles to divert certain streams of water that fed into Mono Lake.<sup>86</sup> The diversion resulted in a drop in water level in Mono Lake, which supported a wide array of wildlife.<sup>87</sup> The case presented a dichotomy between the PTD and the “appropriative water rights system which since the days of the gold rush has dominated California water law.”<sup>88</sup>

The court reviewed the foundations of the PTD. The purpose of the PTD was determined to have been originally based in “navigation, commerce and fisheries” then expanded in California to include additional recreational uses.<sup>89</sup> The court reasoned that Mono Lake was a navigable waterway or at a minimum, it is a fishery thus subject to protection under the PTD.<sup>90</sup> The scope of the trust was an analysis limited to those traditional lands subjected to the trust and those, like Mono Lake, which have been included under a more expanded view of “navigable waterways.”<sup>91</sup>

The final stage of the analysis was to consider the State’s duties and powers as trustee. The court emphasized that “parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.”<sup>92</sup> The court cited to the *Illinois Central* case for determining whether the State had acted within their duties and powers as the trustee or if they had acted more in a manner akin to the Illinois Legislature.<sup>93</sup> The court determined that the PTD requires the use of “public properties for public

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<sup>84</sup> Ill. Cent. R.R. Co., 146 U.S. at 460-463 (rejecting Illinois Central Railroad’s argument that the lands had been actually conveyed rather than having received the equivalent of a license).

<sup>85</sup> Ill. Cent. R.R. Co., 146 U.S. at 460-63 (The decision put the two grants of the State Legislature at odds, one which championed the public interest and one that seemingly violated the public interest, and so the repeal operated to terminate the latter).

<sup>86</sup> Nat’l Audubon Soc’y v. Superior Court, 33 Cal.3d 419 (1983).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 426.

<sup>89</sup> *Id.* at 434.

<sup>90</sup> *Id.*

<sup>91</sup> Nat’l Audubon Soc’y, 33 Cal.3d at 435 (discussing two state decisions in which the actions of a party had impacted public trust land and reasoning that “the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries”).

<sup>92</sup> Nat’l Audubon Soc’y, 33 Cal.3d at 437.

<sup>93</sup> *Id.* at 437-38.

purposes” and there is a duty on the State, as trustee, to “protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”<sup>94</sup>

In reviewing the relationship between the PTD and the California water right system, the court concluded that each of the systems of management “would occupy the field of allocation of stream waters to the exclusion of any competing system of legal thought.”<sup>95</sup> The court reasoned that the mutual exclusivity of these two systems was not compatible with our legal system, which necessitated a compromise that would integrate the two.<sup>96</sup>

The court held that the State has the right to exercise dominion over the navigable waters, including lands beneath them, but that when considering uses of the waterways or uses that would impact them, the State has “as affirmative duty to take the public trust into account.”<sup>97</sup> In so holding, the court sought to infuse the two regimes to “clear away the legal barriers” and enable the State to take “a new and objective look at the water resources of Mono Basin” while protecting “human and environmental uses of Mono Lake” because “such uses should not be destroyed because the state mistakenly thought itself powerless to protect them.”<sup>98</sup>

## B. CLIMATE CHANGE LITIGATION EVOLUTION

### 1. Massachusetts v. EPA

In *Massachusetts v. EPA*, the Supreme Court reviewed a claim by the State of Massachusetts for harms due to climate change because the EPA had denied a petition to begin regulating the emissions of carbon dioxide, as a pollutant, from new automobiles.<sup>99</sup> The case largely revolves around the issue of standing, in particular whether under the *Lujan* standard there is a demonstrated “concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and

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<sup>94</sup> *Id.* at 440-41.

<sup>95</sup> *Id.* at 445.

<sup>96</sup> *Id.*

<sup>97</sup> Nat'l Audubon Soc'y, 33 Cal.3d at 445-47.

<sup>98</sup> *Id.* at 452.

<sup>99</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007); *See also* Washington Environmental Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013) *infra* Part III(b)(1) (discussing the Ninth Circuit's narrowing of the standing test announced in *Massachusetts v. EPA*; *Cf.* Randall S. Abate, *Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 121 (2008) (discussing the impacts of *Massachusetts v. EPA* on standing in environmental jurisprudence).



that it is likely a favorable decision will redress that injury.”<sup>100</sup> The Court reasoned that the litigant was vested with a procedural right as a result of 42 U.S.C. §7607(b)(1), which grants judicial review to challenge agency action.<sup>101</sup> The Court looked to *State of Georgia v. Tennessee Copper Co.* to reason that Massachusetts, like Georgia, had a vested interest in the outcome of the case sufficient “to warrant the exercise of federal judicial power” and that Massachusetts’ interest in “protecting its quasi-sovereign interests” entitled it to “special solicitude in our standing analysis.”<sup>102</sup>

The harm alleged by the Commonwealth of Massachusetts was one where the rise of sea levels due to global warming would precipitate a sufficient loss of coastal property because the Commonwealth “owns a substantial portion of the state’s coastal property.”<sup>103</sup> This potential loss of land gives rise to the possibility that the EPA may exercise its rulemaking authority to limit greenhouse gas emissions to curtail the extent of the harm.<sup>104</sup>

## 2. Public Nuisance

In pursuing claims for climate change, the issue of regulation is often seen as both a positive and a negative, but in the *American Electric Power Company* case the issue of federal regulation served as a bar to a common law right to seek abatement of carbon dioxide emissions.<sup>105</sup> The Court addressed the issue by looking at (1) the availability of a federal common law right, (2) whether congressional action on a question previously at issue under federal common law removes a need for it to be addressed, and (3) when there is federal regulation on point, whether the

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<sup>100</sup> *Massachusetts v. EPA*, 549 U.S. at 517.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 519-20; *See generally* *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (discussing the State of Georgia pursuing a claim against the Tennessee Copper Co. for the “[discharge] of noxious gas from their works in Tennessee over [Georgia’s] territory.” The Court reasoned that the State had an interest “independent of and behind the titles of its citizens, in all the earth and air within its domain.” The Court also reasoned that “it is fair and reasonable demand” by the State of Georgia, or any other sovereign, “that the air over its territory should not be polluted ... by acts of persons beyond its control.” The Court concurred with the assertion by the State of Georgia that the pollution generated by the Tennessee Copper Co. was impacting the lands that they sovereignly held, which is similar to the public trust albeit navigable waters were not implicated explicitly, and that the State was entitled to their relief until the Tennessee Copper Company could complete their new structures).

<sup>103</sup> *Massachusetts v. EPA*, 549 U.S. at 523.

<sup>104</sup> *Id.* at 526.

<sup>105</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011); *See also* James W. Shelson, *The Misuse of Public Nuisance Law to Address Climate Change*, 78 DEF. COUNS. J. 195, 205-09 (2011) (hereinafter *Misuse of Public Nuisance*).

resulting government entity's inaction in regulating the particular cause of action does not result in displacement.<sup>106</sup>

The Court determined that there was indeed federal common law and a right to pursue a claim, if the subject is one of national concern.<sup>107</sup> The Court cited to a prior case that stated "air and water in their ambient or interstate aspects" do give rise to a claim under federal common law.<sup>108</sup> However, the availability of a federal common law claim is "an academic question" because of the presence of the "Clean Air Act and the EPA actions the Act authorizes."<sup>109</sup>

The implementation of displacement depends on whether Congress has addressed "a question previously governed by a decision that rested on federal common law" and if it has addressed that then "the need for such an unusual exercise of law-making by federal courts disappears."<sup>110</sup> The threshold test is not subject to the same level of scrutiny that a state law may be; the Court stated that "legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose.'"<sup>111</sup> The Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."<sup>112</sup>

The EPA is free to seek any of its authorized methods of enforcement and when it has not "set emission limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter."<sup>113</sup> The plaintiffs had argued that if the EPA actually exercised its authority then the displacement would occur, and if it had not actually exercised its authority, then no displacement would occur.<sup>114</sup> The Court stated that "the Clean Air Act is no less an exercise of the legislature's 'considered judgment' concerning the regulation of air pollution because it permits emissions until EPA acts."<sup>115</sup> The result is that the EPA has been delegated the power of regulate CO<sup>2</sup> emissions from power plants, which displaces the ability of a party to seek enforcement through litigation.<sup>116</sup>

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<sup>106</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2530.

<sup>107</sup> *Id.*

<sup>108</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2530.

<sup>109</sup> *Id.* at 2537.

<sup>110</sup> *Id.*

<sup>111</sup> See *supra* note 109.

<sup>112</sup> *Id.*

<sup>113</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2538.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 2538 (considering the issue of determining whether the inaction by the EPA changed the legislative intent to displace based on prior case law).

<sup>116</sup> *Cool Lawsuits*, *supra* note 51, at 55.

The Court ultimately concluded that plaintiff's state law action depended on the preemptive effect of the federal act, where the Clean Air Act displaced a federal common law cause of action based on the holding of *International Paper Co. v. Ouellette*.<sup>117</sup>

In *Comer*, plaintiffs asserted claims for private nuisance due to the defendant's release of "by-products that led to the development and increase of global warming, which produced the conditions that formed Hurricane Katrina, which damaged their property."<sup>118</sup> The District Court ultimately rejected their claim based primarily on *res judicata*, the lack of standing for the plaintiffs, the political question doctrine, and displacement by the Clean Air Act.<sup>119</sup> The plaintiffs appealed the decision to Fifth Circuit Court of Appeals, which affirmed the lower court's ruling on the basis of *res judicata*.<sup>120</sup>

In the lower court decision, the main issues of relevance here are standing, political question and displacement.<sup>121</sup> The focus issue of the standing was on causation.<sup>122</sup> The court reasoned that the plaintiffs' assertions of causation, when viewed in the context of the EPA's findings on greenhouse gases, "does not in and of itself support the contention that the plaintiffs' property damage is fairly traceable to the defendants' emissions."<sup>123</sup> This contribution, or lack thereof, meant that the plaintiffs' allegations of contribution "to the kinds of injuries that they suffered" were insufficient for standing and represented only part of the required elements.<sup>124</sup> Ultimately, standing was denied because the burden of proving standing resides with the plaintiffs, whose alleged injuries were more difficult to prove than those in *Massachusetts v. EPA* or *American Electric Power Co.* due to their tenuous nature as pled.<sup>125</sup>

The court briefly reviewed the political question doctrine in light of the plaintiff's prayer for relief and assertions of causal link between the

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<sup>117</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2540 (citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987)); *See also* *Bell v. Cheswick Generating Station*, No. 12-4216, 2013 WL 4418637 \*1 (3rd Cir. August 20, 2013) *infra* Part III.C.

<sup>118</sup> *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (2012); *See also* *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460 (2013); *Misuse of Public Nuisance*, *supra* note 105, at 209-12.

<sup>119</sup> *Comer*, 839 F. Supp. 2d at 849.

<sup>120</sup> *Comer*, 718 F.3d at 460.

<sup>121</sup> *See supra* note 118.

<sup>122</sup> *Comer*, 839 F. Supp. 2d at 858 (citing *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 478 (2009)); *See also* *Massachusetts v. EPA*, 549 U.S. at 517; *See generally* *Bellon*, 732 F.3d at 1131.

<sup>123</sup> *Comer*, 839 F. Supp. 2d at 860-61.

<sup>124</sup> *Id.* at 861.

<sup>125</sup> *Id.* at 861-62 (citing the court's decision in the prior *Comer* case disallowing "discovery that will likely cost millions of dollars, when the tenuous nature of the causation alleged is readily apparent at the pleadings stage of litigation").

release of defendants' by-products and an increase in global warming.<sup>126</sup> However, the plaintiffs contended that their prayer for relief was not "asking [the] court to regulate emissions or to make policy determinations concerning climate change" but the court cited portions of the plaintiff's complaint that meant the court would have to "determine that the defendants' levels of emissions are 'unreasonable.'"<sup>127</sup>

The court also ruled that the plaintiffs' claim was displaced by the Clean Air Act, citing to *Am. Elec. Power Co.* where the plaintiffs similarly requested relief relating to the emissions by the defendants and the court's need to make a determination as to the reasonableness of those emissions.<sup>128</sup>

The State of California has been at the forefront of global warming and PTD cases as seen in *National Audubon*.<sup>129</sup> However, courts have occasionally transitioned from injunctive relief to damages for causes of action under a theory of climate change<sup>130</sup> and the *Native Village of Kivalina v. ExxonMobil Corp.* case is illustrative of that dilemma.<sup>131</sup>

In *Kivalina*, the Village of Kivalina is the governing body for the approximately 400 Eskimo villagers who reside in the City of Kivalina.<sup>132</sup> The villagers have asserted a claim based on the increased temperatures as a result of global warming reducing the amount of Arctic sea ice that protects the coastline and resulting in erosion and destruction forcing the relocation of the villagers.<sup>133</sup> The court was presented with a claim of common law nuisance by a request for relief that is neither injunctive nor monetary damages, but an estimated requirement of "\$95 million to \$400 million" and various requests for dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).<sup>134</sup>

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<sup>126</sup> *Id.* at 862.

<sup>127</sup> *Id.* at 864.

<sup>128</sup> *Comer*, 839 F. Supp. 2d at 865; *See also* California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 \*1 (N.D. Cal. Sept. 17, 2007) (discussing the claim by the State of California against a group of automobile manufacturers in which they sought damages rather than an injunction, which is a notable departure from prior cases in climate change litigation, but ultimately the Court held that "it cannot adjudicate Plaintiff's federal common law global warming nuisance tort claim without making an initial policy determination of a kind clearly for nonjudicial discretion."); *Misuse of Public Nuisance*, *supra* note 105, at 212-13 (discussing California v. General Motors Corp., 2007 WL 2726871 at \*1).

<sup>129</sup> *See supra* note 88.

<sup>130</sup> *See generally* California v. Gen. Motors Corp., 2007 WL 2726871 at \*1; *Misuse of Public Nuisance*, *supra* note 105, at 212-13.

<sup>131</sup> *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (2009); *Misuse of Public Nuisance*, *supra* note 105, at 213-15.

<sup>132</sup> *Native Village of Kivalina*, 663 F. Supp. 2d at 863.

<sup>133</sup> *Id.* at 865.

<sup>134</sup> *Id.* at 870.

The court evaluated the plaintiff's standing and the defendants argued that the matter at issue should be dismissed on political question doctrine and standing grounds.<sup>135</sup> The court primarily reviewed the political question doctrine because "the Supreme Court has indicated that disputes involving political questions lie outside of the Article III jurisdiction of federal courts."<sup>136</sup> The court reiterated the *Baker v. Carr* test for political question and summarized it into three groupings.<sup>137</sup>

The court reviewed each of the six tests outlined in *Baker v. Carr*, starting with textual commitment.<sup>138</sup> The textual commitment test is one where "the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power."<sup>139</sup> The defendants had argued that the case violated the first test because of the global nature of the harm and the Constitution's textual commitment of foreign relations to the executive branch.<sup>140</sup> The court cited two cases for the propositions that "the very nature of executive decisions as to foreign policy is political, not judicial" although "*Baker* cautioned against 'sweeping statements' that imply all questions involving foreign relations are political ones."<sup>141</sup> The court determined that while the "indisputably international dimension of this particular environmental problem does not render the instant controversy a non-justiciable one...global warming issues may implicate foreign policy and related economic issues, and the fact that this case 'touches foreign relations' does not ipso facto place it beyond the reach of the judiciary."<sup>142</sup>

The second and third prongs under the *Baker* test can be lumped together when the court reviewed the "well-settled principles of tort and public nuisance law," as applicable, but reasoned that these principles would not provide guidance here since the current court is "not so sanguine" as the Supreme Court when deciding *Am. Elec. Power Co.*<sup>143</sup> In fact, the court further reasoned that "the harm from global warming involves a series of events disconnected from the discharge itself" and the liability and damages extending from such an attenuated chain of causation is "on a scale unlike any prior environmental pollution case cited by the Plaintiffs" thus the second test precluded judicial consideration.<sup>144</sup>

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<sup>135</sup> *Id.* at 870.

<sup>136</sup> *Native Village of Kivalina*, 663 F. Supp. 2d at 871.

<sup>137</sup> *Id.* at 871-72.

<sup>138</sup> *Id.* at 872.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 872-73.

<sup>141</sup> *Native Village of Kivalina*, 663 F. Supp. 2d at 873.

<sup>142</sup> *Id.* at 873.

<sup>143</sup> *Id.* at 875.

<sup>144</sup> *Native Village of Kivalina*, 663 F. Supp. 2d at 876.

The court evaluated the plaintiffs' Article III standing and concluded that plaintiffs had not alleged a valid injury.<sup>145</sup> The plaintiffs assert, "[T]hey need only allege that defendants 'contributed' to their injuries" and concede, "they are unable to trace their alleged injuries to any particular defendant."<sup>146</sup> The basis for this assertion is from the context of the Clean Water Act for contribution principles, but the court rejects that this does not preclude the party from the injury requirements in a common law nuisance claim, which is substantially distinguishable from a statutory water pollution claim.<sup>147</sup> The plaintiffs further contended that they were entitled to receive "special solicitude" treatment for Article III standing similar to the Commonwealth of Massachusetts in *Massachusetts v. EPA*.<sup>148</sup> However, the court rejected that argument based on the fact that the plaintiffs are not "seeking to enforce any procedural rights concerning an agency's rulemaking authority" but rather their "claim is one for damages directed against a variety of private entities."<sup>149</sup>

The court's holding was that the "plaintiffs' federal claim for nuisance is barred by the political question doctrine and for lack of standing under Article III."<sup>150</sup> The plaintiffs appealed the case to the Ninth Circuit Court of Appeals. The Ninth Circuit held that the District Court had properly rejected the claim by the Village of Kivalina, concluding that the Clean Air Act displaced a federal common law claim for public nuisance as seen in *Am. Elec. Power Co. and Bell v. Cheswick Generating Station*.<sup>151</sup>

### 3. Atmospheric Trust Litigation Cases<sup>152</sup>

Thus far, there have been several notable cases brought in state courts under the Atmospheric Trust Litigation theory, which will be reviewed briefly.

In *Butler ex rel. Peshlakai v. Brewer*, the Nation's first ATL case "to be heard on its merits," was argued in 2012.<sup>153</sup> However, the case was

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<sup>145</sup> *Id.* at 878.

<sup>146</sup> *Id.*; See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

<sup>147</sup> *Native Village of Kivalina*, 663 F. Supp. 2d at 879-80.

<sup>148</sup> *Id.* at 882.

<sup>149</sup> *Id.*

<sup>150</sup> *Native Village of Kivalina*, 663 F. Supp. 2d at 883.

<sup>151</sup> *Id.* at 858 (citing Supreme Court precedent that "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement."); *Bell v. Cheswick Generating Station*, 2013 WL 4418637 at \*1 *infra* Part III.C.

<sup>152</sup> See also *Barhaugh v. State*, 264 P.3d 518 (Mont. 2011); Amy Poehling Eddy, *The Climate Petition and the Public Trust Doctrine*, 36-Aug. MONT. LAW. 6 (2011) (discussing the efforts by petitioners seeking to have the State of Montana adopt regulations to curb GHG emissions and the denial & dismissing that resulted); *States with Active Lawsuits*, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/US/LawsuitStates> (last visited Nov. 10, 2013).

subsequently appealed due to the dismissal under Arizona Rule of Civil Procedure 12(b)(6).<sup>154</sup> The plaintiffs' complaint sought relief "on the basis of the PTD" by requesting that the court declare "atmosphere is a public trust asset" and "defendants have a fiduciary obligation as trustees to take affirmative action to preserve the atmosphere and other trust assets from impacts associated with climate change."<sup>155</sup> On appeal, the plaintiffs amended the complaint to solely address "whether the [PTD] in Arizona includes the atmosphere."<sup>156</sup>

The plaintiffs' allegations involve "state inaction," which is not alleged to have been a violation of "any specific constitutional provision on which relief can be granted."<sup>157</sup> The relevant cases in Arizona's PTD jurisprudence also "do not provide a constitutional basis for [the plaintiff's] challenge because [they] do not assert that the state improperly disposed of a public trust resource."<sup>158</sup> Ultimately, the plaintiff did not assert any "constitutional provision from which we may derive the public trust protections and remedy [they urge]."<sup>159</sup> The court could not "order the defendants to take actions in violation of a statute unless we determine the statute is unconstitutional" thus "[b]ecause we determine that relief cannot be granted, [plaintiff] is essentially requesting us to issue an advisory opinion which we will not do."<sup>160</sup>

A second ATL case was filed by Gloria dei Filippone, who is a minor, through her mother Maria Filippone against the Iowa Department of Natural Resources.<sup>161</sup> The lawsuit was filed as result of the denial of "a petition for rulemaking pursuant to Iowa Code §17A.7(1)" by *Kids vs. Global Warming* and specifically requested that the Department of Natural Resources ("DNR") "adopt new rules restricting greenhouse gas

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<sup>153</sup> *Butler ex rel. Peshlakai v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209 \*1 (March 14, 2013); *See also* Julie Cart, *Judge sides with New Mexico in Atmospheric Trust Litigation case*, LOS ANGELES TIMES (June 26, 2013), <http://articles.latimes.com/2013/jun/26/science/la-sci-sn-climate-change-lawsuit-20130626>; *Cf. Nature's Trust*, *supra* note 44, at 153.

<sup>154</sup> *Butler ex rel. Peshlakai v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209 1 (March 14, 2013).

<sup>155</sup> *Brewer*, 2013 WL 1091209 at 1.

<sup>156</sup> *Id.* at 2.

<sup>157</sup> *Id.* at 7.

<sup>158</sup> *Brewer*, 2013 WL 1091209 at \*7 (citing *Arizona Center for Law in Public Interest v. Hassell*, 837 P.2d 158 (1991) and *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 972 P.2d 179 (1999)).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 8.

<sup>161</sup> *See generally* *Filippone ex rel. Filippone v. Iowa Dept. of Natural Resources*, 829 N.W.2d 589 (2013).

emissions.”<sup>162</sup> The DNR denied the petition because it “anticipated the Environmental Protection Agency (EPA) will likely be creating new standards, which might be inconsistent with the proposed rules in violation of Iowa Code §455B.133(4).”<sup>163</sup> The DNR also cited that “adopting the proposed rules would require resources and funding to be designated to the program, and that without additional legislatively-appropriated funding, it would be unable to develop and administer the proposed rules.”<sup>164</sup> The District Court held that DNR’s denial was not “unreasonable, arbitrary, capricious, or an abuse of discretion” and the court “declined Filippone’s invitation to expand the public trust doctrine to include the atmosphere.”<sup>165</sup>

On appeal, the court considered three issues: the Inalienable Rights Clause, PTD, and Fair Consideration.<sup>166</sup> The Inalienable Rights Clause, asserts a claim that provides a “right to a life-sustaining atmosphere.”<sup>167</sup> However, Filippone failed to assert this issue before the District Court, which constrained the Court of Appeals from considering the.<sup>168</sup>

The second issue is the PTD and Filippone’s request that the DNR “must consider new rules regarding greenhouse gas emissions because the PTD applies to the atmosphere.”<sup>169</sup> The court noted that the PTD in Iowa is one that “limits the State’s power to dispose of land encompassed within the public trust and is ‘based on the notion that the public possesses inviolable rights to certain natural resources.’”<sup>170</sup> However, the court also noted “the public trust doctrine in Iowa has a narrow scope” and that the Supreme Court of Iowa does not “necessarily subscribe to broad applications of the doctrine, noted by one authority to include rural parklands, historic battlefields, or archaeological remains. In fact, we are cautioned against an overextension of the doctrine.”<sup>171</sup> The limited scope of the PTD resulted in the DNR not having “a duty under the public trust doctrine to restrict greenhouse gases to protect the atmosphere.”<sup>172</sup>

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<sup>162</sup> *Filippone*, 829 N.W.2d at 1; *See generally Iowa / Our Children’s Trust*, OUR CHILDREN’S TRUST, <http://ourchildrenstrust.org/state/Iowa> (last visited Oct. 3, 2013).

<sup>163</sup> *Filippone*, 829 N.W.2d at 1.

<sup>164</sup> *Id.*

<sup>165</sup> *Filippone*, 829 N.W.2d at 1.

<sup>166</sup> *Id.* at 2-3.

<sup>167</sup> *Id.* at 2.

<sup>168</sup> *Filippone*, 829 N.W.2d at 2.

<sup>169</sup> *Id.*

<sup>170</sup> *Filippone*, 829 N.W.2d at 2.

<sup>171</sup> *Id.* at 2 (citing *Fenci v. City of Harpers Ferry*, 620 N.W.2d 808, 813 (Iowa 2000) and *State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989) to support the propositions of limited scope for the Iowan Public Trust Doctrine); *See also Bushby v. Wash. Cnty. Conservation Bd.*, 654 N.W.2d 494, 498 (Iowa 2002) (noting a cite by the Court to a prior decision where “our supreme court declined to extend the doctrine to cover forested areas”).

<sup>172</sup> *Filippone*, 829 N.W.2d at 3.



Therefore, the court concluded that the DNR's denial of the proposed rule was not unreasonable.<sup>173</sup>

The final issue of fair consideration involves the DNR's duty to "give fair consideration to the petition for rulemaking."<sup>174</sup> The Iowan standard is that "an agency give fair consideration to the propriety of issuing the proposed rule" and "it does not require the agency to take a stand on the substantive issues that might prompt the proposal of a rule."<sup>175</sup> The Court of Appeals affirmed the District Court conclusion that the DNR gave fair consideration to the rulemaking petition noting that the "denial of the petition was not unreasonable, arbitrary, capricious, or an abuse of discretion."<sup>176</sup>

The third ATL case for discussion is *Angela Bonser-Lain, et al. v. Texas Commission on Environmental Quality*.<sup>177</sup> Similar to *Filippone*, *Bonser-Lain* case involved a petition for rulemaking.<sup>178</sup> Here, the petition had been submitted to the Texas Commission on Environmental Quality to develop a plan that would reduce carbon-dioxide emissions within the state by six percent per year.<sup>179</sup> The court reviewed the petition for rulemaking, which had been denied on ground that the Texas PTD was "exclusively limited to the conservation of water" and that the Commission was "prohibited from protecting the air quality because of the federal requirements of the Federal Clean Air Act."<sup>180</sup>

In reviewing the Commission's rationale for denying the petition for rulemaking, the court determined that the PTD differed from the traditional common law limitation to the conservation of water, but rather the Texas Constitution required "preservation and conservation of all of the natural resources of this State."<sup>181</sup> The court further reviewed the second rationale of the Commission and held that the Texas Clean Air Act mandated the protection of air quality by citing to Tex. Health & Safety

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* (citing *Cnty. Action Research Grp. v. Iowa State Commerce Comm'n*, 275 N.W.2d 217, 220 (Iowa 1979), which reviewed the standard under Iowa Code §17A.7 for an agency's review of a petition for rulemaking).

<sup>176</sup> *Filippone*, 829 N.W.2d at 3.

<sup>177</sup> *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 \*1 (Tex. Dist. Aug. 2, 2012); *See also Nature's Trust*, *supra* note 44, at 153.

<sup>178</sup> *Compl. at 2, Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, 2011 WL 8202306 \*1 (Tex. Dist. July 21, 2011); *See generally Br. of Appellees, Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, 2012 WL 3164561 \*1 (Tex. Dist. Aug. 2, 2012).

<sup>179</sup> *Id.*

<sup>180</sup> *Bonser-Lain v. Texas Comm'n on Environmental Quality*, No. D-1-GN-11-002194, 2012 WL 2946041, at \*1 (Tex. Dist. Ct., July 9, 2012).

<sup>181</sup> *See Bonser-Lain*, 2012 WL 3164561 at \*1 (citing Texas Const. Art. XVI, § 59, which provides the range of resources to be protected).

Code Ann. § 382.002, which requires “safeguard[ing] the state’s air resources from pollution by controlling or abating air pollution and emissions of air contaminants.”<sup>182</sup> The court ultimately denied the Defendant’s Plea for Jurisdiction because the Texas Constitution expanded the scope of the PTD beyond the traditional conservation of water and that the Clean Air Act did not prohibit a State from establishing more stringent rules.<sup>183</sup>

### III. PROPOSAL FOR ADDRESSING IMPACTS OF CLIMATE CHANGE BASED ON NUISANCE FRAMEWORK

This portion of the article will focus on two main points. First is an analysis of the ATL theory when argued on the common law basis for the PTD. This includes claims regarding navigable water ways or related resources, and nuisance claims accounting for permissible claims involving an air-related injury. Second, even if ATL is determined to be viable for the PTD fiduciary breaches, the claims should fail for justiciability concerns.

#### A. *ATMOSPHERIC TRUST LITIGATION IS BEYOND THE INTENDED SCOPE OF THE PUBLIC TRUST*

##### 1. The Doctrine Traditionally Has Been Limited to Navigable Waterways or Related Resources

The PTD, as created and modified in American jurisprudence, has remained primarily focused on the issues relating to and regarding the use of navigable water.<sup>184</sup> In fact, it has been argued that the very basis for the famous Justinian Institutes quotation regarding the “common property of all” was “likely reflecting less the true nature of public rights during the Roman Empire than Justinian’s own idealization of a legal regime.”<sup>185</sup> The basis for the PTD really found its footing in *Illinois Central*, which was decided based on a theory of Public Trust.<sup>186</sup> The *Illinois Central* case sets

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<sup>182</sup> *Bonser-Lain*, 2012 WL 3164561 at \*2.

<sup>183</sup> *Id.*

<sup>184</sup> *Changing Conceptions*, *supra* note 31, at 633-38 (discussion of the origins of the Public Trust Doctrine); *See generally* *Nat’l Audubon Soc’y*, 33 Cal.3d at 435.

<sup>185</sup> *Id.* at 635 (Footnote 12 includes a discussion of the origins of the famous Justinian Institutes quotation, the actuality of a Public Trust Doctrine operating in fact during the Roman Empire, and distinguishes the possibility of that Doctrine with Roman practice of conveying rights for the purpose of exploitation).

<sup>186</sup> *American Public Trust*, *supra* note 74, at 926 (citing “What is less clear is why Justice Field felt compelled to reach for the blunderbuss of the public trust doctrine to defeat the *Illinois Central*’s vested-rights claim, rather than a more fact-specific argument, such as Justice Harlan’s characterization of the grant of the outer harbor as a revocable license”).

forth the basis for the disposition of Public Trust assets by the Trustee—in that case it was the State legislature attempting to dispose of assets, and also as much about how the Trustee may use the lands subject to the Public Trust to improve the utility for “whole of the people.”<sup>187</sup>

The restriction set forth by *Illinois Central* raises the issue of what lands are actually subject to the Public Trust doctrine.<sup>188</sup> *Arnold v. Mundy*, a 19th century New Jersey case, is a good starting point for defining the types of lands subject to the Public Trust as it predates both *Martin v. Waddell's Lessee* and *Pollard's Lessee v. Hagan*.<sup>189</sup> In *Arnold*, the court defined the types of land common to “whole of the people” of New Jersey: Navigable rivers, the ports, bays, coasts of the sea for the purposes of passing, navigation, fishing, fowling, sustenance, and all other uses of the water or its products.<sup>190</sup> The basis for the property rights derived from a grant from the King of England to the “duke of York...in which *the rivers, ports, bays, and coasts were a part*, passed to the duke of York, ... exercising the royal authority.”<sup>191</sup> The State of New Jersey, including the whole of the people, succeeded to “all of those royal rights” as a result of the Revolution.<sup>192</sup> The Supreme Court recognized this in *Martin v. Waddell's Lessee* and further stated that the Duke of York's grant was “held by the king in his public and regal character, as the representative of the nation; and in trust for them.”<sup>193</sup> The Court further held that “the people of each state became themselves sovereign; and in that character, *held the absolute right to all their navigable waters, and the soil under them; for their own common use*, subject only to the rights since surrendered by the constitution to the general government.”<sup>194</sup> The Supreme Court in *Pollard* referenced the proposition from holding of *Martin v. Waddell's Lessee* that the lands subject to the PTD remain an issue of the states by stating “[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and

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<sup>187</sup> See generally *Ill. Cent. R.R. Co.*, 146 U.S. at 387; See also *American Public Trust*, *supra* note 74, at 929-930.

<sup>188</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 387.

<sup>189</sup> See *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821); See generally *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842) (A New Jersey action reviewing the “State rights in tide-waters”); See generally *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845) (discussing the nature of navigable waterways in relation to the State of Alabama's admittance into the Union).

<sup>190</sup> *Id.*

<sup>191</sup> *Arnold*, 6 N.J.L. at 1 (emphasis added).

<sup>192</sup> *Id.*

<sup>193</sup> *Martin*, 41 U.S. at 367.

<sup>194</sup> *Id.* (emphasis added).

jurisdiction over this subject as the original states.”<sup>195</sup> Thus, navigable waters and related lands are subject to the State’s definition of the PTD that the State must use in a manner consistent with their duties under the doctrine.<sup>196</sup>

This progression of cases, when coupled with *Illinois Central*, clearly establishes a common law traditional jurisprudence linking the PTD to lands related to navigable waters.<sup>197</sup> When this basis is added to the limitation in absolute title imposed upon the King of England by holding title “only for the benefit of the public” this means that the states could “enjoy no greater title” than what the King of England held.<sup>198</sup>

Expansion of the PTD must be limited when defining scope of the resources as those “extending to ‘property of a special character’ and of ‘public concern to the whole people of the state’” as laid out by *Illinois Central*.<sup>199</sup> The court in *National Audubon Society* faced the dilemma over whether the Mono Lake tributary streams qualified as navigable waters.<sup>200</sup> It reasoned that while the streams did not qualify themselves as navigable waterways, the disruptions of the streams caused a drop in the water levels of Mono Lake, which is navigable water, and thus could be managed under the PTD.<sup>201</sup>

An examination of the holding in *PPL Montana, LLC v. Montana* addressed what the “contours of the public trust” are and upon what they depend.<sup>202</sup> The Court stated that the public trust does not rely on the Constitution to define its scope but rather “[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders.”<sup>203</sup> This principle has been demonstrated in the course of litigation sought under the theory of ATL: where the State has expanded the contours of the public trust, the results have been different from states in which there has been no change.<sup>204</sup>

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<sup>195</sup> *Pollard's Lessee*, 44 U.S. at 212.

<sup>196</sup> Barton H. Thompson, Jr., *Water as a Public Commodity*, 95 MARQ. L. REV. 17, 21 (2011).

<sup>197</sup> See *supra* note 241.

<sup>198</sup> Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 58 (2006) (hereinafter *Conservative Reconstruction*).

<sup>199</sup> *Id.* at 59 (citing *Ill. Cent. R.R. Co.*, 146 U.S. at 454-55).

<sup>200</sup> See generally *Nat'l Audubon Soc'y*, 33 Cal. 3d at 419; *Conservative Reconstruction*, *supra* note 196, at 59-63.

<sup>201</sup> *Id.*

<sup>202</sup> *PPL Montana v. Montana*, 132 S. Ct. 1215, 1234-35 (2012) (holding that the State of Montana did not hold title, under the equal footing doctrine, to riverbeds that were under segments of rivers that were non-navigable at the time of entry into the Union).

<sup>203</sup> *PPL Montana v. Montana*, 132 S. Ct. 1215, 1234-35 (2012).

<sup>204</sup> Compare *Filippone*, 829 N.W.2d at 589, with *Bonser-Lain*, 2012 WL 3164561 at \*1; However, also see *Alec L.*, 863 F. Supp. 2d at 11; *Brewer*, 2013 WL 1091209 at \*1; *Barhaugh*, 361 Mont. at 1.

## 2. Air, When Used, Was the Result of a Nuisance Claim Outside the Scope of the Trust

Judicial expansion of the PTD has generally eschewed expanding the trust to include the atmosphere, even though *the air* has been the basis of litigation, and “judicial expansion has not been one to impose the common law public trust to resources other than navigable waters.”<sup>205</sup> The holding in *Georgia v. Tennessee Copper Co.* provides insight into that reluctance when the Court focused not on the fact that pollution was caused by the sulphurous acid gas but instead on the “domestic destruction they have suffered.”<sup>206</sup> The Court reasoned that the “wholesale destruction of forests, orchards, and crops” caused by the defendant’s use of their land to process ore in a manner that “the tall chimneys in present use cause the poisonous gases to be carried to greater distances” was sufficient to establish “there is no alternative to issuing an injunction.”<sup>207</sup>

The expansion of the public trust to include the atmosphere could potentially introduce the argument (by analogy) that the waterways were the ancient “public highway” and the air is the more modern “public highway” based on the holding in *United States v. Causby*, where the Court stated “[t]he navigable airspace which Congress has placed in the public domain . . . .”<sup>208</sup> The Court subsequently stated that the “[t]he airspace, apart from the immediate reaches above the land, is part of the public domain” for the questions of whether flights over Causby’s property constituted a potential taking in the case.<sup>209</sup> However, the situation in *Causby* is distinguishable from that of an ATL where the issue is primarily centered on global warming as opposed to the mere trespassory nature of overflights where “invasions of [air] are in the same category as invasions of the [land].”<sup>210</sup>

In the case of an argument by analogy to wildlife or game, using *District of Columbia v. Air Florida, Inc.* or *Geer v. Connecticut* as a basis, the analogy would be distinguishable from the basis of these decisions under *parens patriae* rather than the PTD per se.<sup>211</sup> In *Air Florida*, the

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<sup>205</sup> *Is the Public Trust*, *supra* note 15, at 26 (citing to *Marks v. Whitney*, 6 Cal.3d 251 (1971)).

<sup>206</sup> *Tenn. Copper Co.*, 206 U.S. at 238-39.

<sup>207</sup> *Id.* at 239.

<sup>208</sup> *United States v. Causby*, 328 U.S. 256, 263-64 (1946) (discussing the relevant limits to a property owner’s use and enjoyment of their property and contrasting the ancient tradition where the upper limit was the “periphery of the universe”).

<sup>209</sup> *Id.* at 266.

<sup>210</sup> *Causby*, 328 U.S. at 265.

<sup>211</sup> See generally *Geer*, 161 U.S. at 519; *Air Fla., Inc.*, 750 F.2d at 1077; *Marks*, 6 Cal.3d at 251; Cf. Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable*

Court held that the defendant was liable under the PTD.<sup>212</sup> The river, which is a navigable waterway under the PTD, provided the Court a basis to find that Air Florida owed a duty of care regarding the river, which was breached by the crash.<sup>213</sup> California has been a leader in the area of environmental litigation related to the public trust lands, but even it distinguishes between “common law public trust applicable to navigable waters and a public trust that arises from a statute that specifically provides that fish or wildlife are held in trust for the people and are regulated by a state agency pursuant to a specific statute.”<sup>214</sup> Additionally, the regulation of wild animals and their state-based ownership has been removed from this analogy since the United States Supreme Court has also overruled *Geer*.<sup>215</sup>

The final word on whether an analogy argument can be made or if the air is even subject to being classified as a part of the public trust may have been given when the Supreme Court addressed the issue of GHG emissions in *American Electric Power*.<sup>216</sup> The Court acknowledged the limited applicability of “federal common law when dealing ‘with air and water in their ambient or interstate aspects’ in light of the existence of the [Clean Air Act].”<sup>217</sup> In *Am. Elec. Power Co.*, the Court stated that Congressional acts “installed an all-encompassing regulatory program, supervised by an expert administrative agency,” in this case the EPA, to deal with pollution.<sup>218</sup> Thus, categorizing air as a component of the public trust may fall into a group of claims that are non-justiciable even if the air or atmosphere were to be included at common law.<sup>219</sup>

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*Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322 (2006). *Contra Nature's Trust*, *supra* note 44, at 146-47.

<sup>212</sup> *Air Fla., Inc.*, 750 F.2d at 1078.

<sup>213</sup> *Id.*

<sup>214</sup> *Is the Public Trust*, *supra* note 15, at 26.

<sup>215</sup> *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (stating “*Geer v. Connecticut* ... is overruled. Time has revealed the error of the result reached in *Geer* through its application of the 19th century legal fiction of state ownership of wild animals. Challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources”).

<sup>216</sup> *Is the Public Trust*, *supra* note 15, at 26.

<sup>217</sup> *Id.*

<sup>218</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2537.

<sup>219</sup> *Id.* (stating, “[W]hen Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of law-making by federal courts disappears.” *Milwaukee II*, 451 U.S., at 314, 101 S. Ct. 1784 (holding that amendments to the Clean Water Act displaced the nuisance claim recognized in *Milwaukee I*)).

*B.       ATMOSPHERIC TRUST LITIGATION, IF VIABLE, FAILS FOR  
JUSTICIABILITY CONCERNS*

In the event that ATL is found to be a viable expansion of the PTD, the next set of hurdles that the litigants must overcome is that laid out in Article III concerning standing and non-violation of the political question doctrine.<sup>220</sup>

1. Standing

In order to address Standing in this instance, we must look to *Lujan v. Defenders of Wildlife*. This case articulates the three-part test for standing: injury in fact, causation, and redressability.<sup>221</sup>

The standing requirement was a large portion of the decision in *Lujan* because the plaintiffs alleged that the actions of the Secretaries of the Interior and Commerce in regards to foreign nations would violate the Endangered Species Act of 1973.<sup>222</sup> The Court reviewed the alleged harm by the plaintiffs and in the standing analysis found that in order to invoke federal jurisdiction.<sup>223</sup> The Court stated a test for standing that required the plaintiff carry the “burden of showing standing by establishing, inter alia, that they have suffered an injury in fact, i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest.”<sup>224</sup> The plaintiff must also be able to demonstrate a “causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court.’”<sup>225</sup> The third prong of the test is that there must be redressability or the prospect that the Court will grant “must be ‘likely,’ as opposed to merely ‘speculative.’”<sup>226</sup>

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<sup>220</sup> U.S. Const., art. III, § 2, cl. 1 (The requirement that in order for judicial power to be available, the issue before the Court must involve “Cases, in Law and Equity, arising under this Constitution” or “Controversies to which the United States shall be a Party”).

<sup>221</sup> See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>222</sup> *Id.*

<sup>223</sup> *Lujan*, 504 U.S. at 555-6.

<sup>224</sup> *Id.*; See also *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

<sup>225</sup> *Lujan*, 504 U.S. at 560; See also *Bellon*, 732 F.3d at 1143-44 (citing *Allen v. Wright*, 468 U.S. 737 n. 19 (1984), which states that “[t]he ‘fairly traceable’ and ‘redressability’ components of the constitutional standing inquiry were initially articulated by this Court as ‘two facets of a single causation requirement.’”); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1228 n. 5 (9th Cir. 2008).

<sup>226</sup> *Lujan*, 504 U.S. at 560-61.

The party that invokes the jurisdiction of the federal courts is the same party that “bears the burden of establishing these elements.”<sup>227</sup>

The Court reasoned that while the respondents established a “special interest in the subject” by their members they did not, however, demonstrate that they suffered any injury in fact.<sup>228</sup> The respondents “state purely speculative, nonconcrete injuries when they argue that suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals.”<sup>229</sup> The Court also determined that the respondents not only lacked injury, but that “failed to demonstrate redressability.”<sup>230</sup> By failing to include the agencies which granted the funding for the projects at issue, but the Court could not grant relief requested by the respondents by order non-parties to capitulate unless they were “bound by the Secretary’s regulation, which is very much an open question.”<sup>231</sup> Ultimately, the Court held that the respondents “lack standing to bring this action” and the Court reversed the Court of Appeals decision stating “the Court of Appeals erred in denying the summary judgment motion filed by the United States.”<sup>232</sup>

In *Massachusetts v. EPA*, the State was subjected to the standing analysis from *Lujan* but also recognized that Congress had “‘accorded a procedural right to protect [their] interests” and “can assert that right without meeting all the normal standards for redressability and immediacy.”<sup>233</sup> The Court permitted the Commonwealth of Massachusetts a “special solicitude” and reasoned that like the State of Georgia in *Tennessee Copper Co.*, Massachusetts should be able to assert action to protect its quasi-sovereign rights.<sup>234</sup> Massachusetts’ burden for injury was more easily met because the “special solicitude” permitted an aggregation of actual or imminent injury for all of the citizens.<sup>235</sup>

The Ninth Circuit’s ruling in *Washington Environmental Council v. Bellon* has narrowed the requirements for standing by reviewing a lower court’s ruling on the Plaintiff’s action to “compel the [agencies] to regulate [GHG] emissions from the state’s five oil refineries under the [Clean Air Act].”<sup>236</sup> In order to meet the burden under standing, the Plaintiffs were

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 568.

<sup>231</sup> *Lujan*, 504 U.S. at 568.

<sup>232</sup> See *supra* note 221 at 578.

<sup>233</sup> *Massachusetts v. EPA*, 549 U.S. 497, 498-99 (2007).

<sup>234</sup> *Id.* at 520 n. 17 (discussing the ruling of *Georgia v. Tenn. Copper Co.* as one of standing).

<sup>235</sup> *Id.*

<sup>236</sup> *Bellon*, 732 F.3d at 1131, 1135 (basing the review of Article III standing, despite the lack of a challenge by the defendant, on *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)).



required to show an injury in fact,<sup>237</sup> the causality of that injury based on the Defendant's action,<sup>238</sup> and redressability.<sup>239</sup> The court also reviewed the Plaintiffs claim for relaxed standing requirements similar to those that the Commonwealth of Massachusetts was held to, but the court distinguished this by determining that neither the council nor its members were a sovereign, nor did they exercise a procedural right.<sup>240</sup> The Court ultimately held that the Plaintiffs had failed to meet their burden for Article III standing and had not satisfied the "irreducible constitutional minimum" as required by *Lujan* and thus the lower court did not have jurisdiction to rule on the merits.<sup>241</sup>

In the ATL cases presented earlier, the plaintiffs generally alleged that the State had not thoroughly conducted their duties under the PTD and that as a result some harm, related to climate change, had or would injure them if relief were not granted. The plaintiffs have also generally petitioned the State agency responsible for environmental protection for rulemaking related to carbon dioxide emissions prior to filing their suit. Using these as the two steps that would be taken for a plaintiff who files a well-pled complaint under the theory of ATL, the following is an analysis of how the federal courts may treat the claim for standing purposes.

The first step is to determine whether the plaintiff would be able to establish that they suffered an injury in fact that is both "concrete and particularized."<sup>242</sup> The plaintiff would not be able to claim some exception from normalized standing under a rule similar to what the Commonwealth

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<sup>237</sup> *Bellon*, 732 F.3d at 1137-138 (reviewing the various claims by the plaintiffs to illustration an injury, either currently or a risk of future harm, but since the defendants did not dispute the claims the court assumed, without deciding, that the plaintiffs had met their burden).

<sup>238</sup> *Id.* at 1138-142 (citing various cases in their review of causation, but in specificity the inability of the plaintiffs to demonstrate causality because of the significant attenuation of the defendant's alleged misconduct and the plaintiff's assumed injury in fact. The court's review of the alleged misconduct required more than "vague, conclusory statements" linking the misconduct to "their purported injuries." The court specifically noted the causal chain's "series of links strung together by conclusory, generalized statements of 'contribution,' without any plausible scientific or other evidentiary basis that the [defendant]'s emissions are the source of their injuries." The court determined, through expert testimony, that the emissions were "scientifically indiscernible" and that there was an "absence of any meaningful nexus" thus resulting in "the causal chain is too tenuous to support standing").

<sup>239</sup> *Bellon*, 732 F.3d at 1143 (reasoning that the failure to meet causality is the same as a failure to meet redressability due to the overlap between the two based on the plaintiff's requested relief of a court order to regulate GHG emissions by the defendants).

<sup>240</sup> *Id.* at 1141-143.

<sup>241</sup> *Bellon*, 732 F.3d at 1144.

<sup>242</sup> *Lujan*, 504 U.S. at 560 (discussing the requirement for an injury to be particularized the injury must not be "widely shared" because otherwise "an injury that is widely shared is ipso factor not an injury sufficient to provide the basis for judicial review" according to *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

of Massachusetts used because their claim is based on a procedural right rather than substantive.<sup>243</sup> Using the *Filippone* case as an example, the plaintiff may have a very difficult time establishing an injury in fact but likely would qualify under the denial of rulemaking exception. However, the claim brought by Nelson Kanuk might satisfy the injury in fact requirement since the erosion of the riverbank is both concrete and particularized to him, at least in his relevant area, but there is the potential that it becomes a “widely spread” injury thus void for judicial review under the “particularized” requirement.<sup>244</sup> The second part of the injury analysis is that the injury must be “actual or imminent, not conjectural or hypothetical.”<sup>245</sup> In the case of the individual without an injury in fact, then they would fail this portion of the first step and be denied standing without an exception for rulemaking appeals. The claim in the form of global warming may also face challenges establishing the “actual or imminent” requirement due to potential challenges on the reliability of the modeling data provided by their expert witness.<sup>246</sup> In the case of Mr. Kanuk, his injury would most likely qualify under imminent harm unless it was shown that there was actual erosion of his land due to the melting of the permafrost.<sup>247</sup>

The second step of the standing analysis requires an evaluation of the “causal connection” from the alleged injury and the defendant’s behavior and that connection must be “fairly traceable” but not the result of some “independent action of [a] third party not before the court.”<sup>248</sup> Here, the harm is results from the denial of rulemaking or, as in the case of Kanuk, the alleged result of global warming due to the inaction of the State to regulate carbon-dioxide emissions. The causal connection in the event of a denial of rulemaking also extends to whether the body has the authority or responsibility to regulate the atmosphere. This belongs in the discussion of whether the PTD is amenable to expansion to include the atmosphere. Assuming *arguendo*, the causal connection between the State’s inaction to

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<sup>243</sup> See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>244</sup> Ed Ronco, *Mt. Edgumbe Senior Sues AK Over Climate Change*, ALASKA PUBLIC MEDIA, <http://www.alaskapublic.org/2012/12/10/mt-edgumbe-senior-sues-ak-over-climate-change/>; See also *supra* note 242.

<sup>245</sup> *Lujan*, 504 U.S. at 560.

<sup>246</sup> Alvaro Hasani, *Forecasting the End of Climate Change Litigation: Why Expert Testimony Based on Climate Models Should Not Be Admissible*, 32 MISS. C. L. REV. 83, 91-94 (2013) (discussing how the *Frye* and *Daubert* standards of expert witness testimony would both take issue with the reliability of this type of testimony based on climate change models).

<sup>247</sup> Compare *Bellon*, 732 F.3d at 1131, with *Lujan*, 504 U.S. at 555, and *Massachusetts v. EPA*, 549 U.S. at 497, and *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Oregon 2006).

<sup>248</sup> *Lujan*, 504 U.S. at 560.

regulate and the harm incurred would be factually similar to *Massachusetts v. EPA* and would likely qualify as fairly traceable.

The third step in the standing analysis is whether the Court can grant relief that is redressable to the alleged injury.<sup>249</sup> In the case of an ATL claim, the courts certainly have demonstrated their capability to issue injunctions to order a regulatory agency to act, such as in *Massachusetts v. EPA*, or grant relief against a private entity, such as in *Tennessee Copper Co.*. As for the claim by Kanuk, the remediation of the riverbank would likely be grantable, but economic considerations may prevent the Court from granting that type of relief because of the impracticability of the remediation.<sup>250</sup>

## 2. Political Question Doctrine

The second hurdle that a potential ATL claim may face is that of non-justiciability due to political question. The Political Question doctrine is one that should be approached with care to ensure that the doctrine must be cautiously invoked because “the mere fact that a case touches on the political process does not necessarily create a political question beyond courts’ jurisdiction.”<sup>251</sup> The Supreme Court has identified six tests that independently can be used by the courts to identify the existence of a political question in the matter before their courts.<sup>252</sup> The six tests are:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>253</sup>

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<sup>249</sup> *Lujan*, 504 U.S. at 561.

<sup>250</sup> See generally *Native Village of Kivalina*, 663 F. Supp. 2d at 863.

<sup>251</sup> *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp.2d 676, 680 (2006) (citing to *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 374 (D.N.J. 2001) (citing *Nixon v. Herndon*, 273 U.S. 536, 540 (1927))).

<sup>252</sup> *Barasich*, 467 F. Supp. 2d at 680.

<sup>253</sup> *Id.* at 680 (citing to *Vieth v. Jubelirer*, 541 U.S. 267, 277–78, (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

For the purposes of this article, only the first, second, and third tests will be discussed despite potential relevance for the fourth, fifth and sixth tests and part of the rationale is that “[t]he tests are probably listed in descending order of both importance and certainty.”<sup>254</sup> The other rationale is that the Court only needs to find one of the six tests indicative of political question for the matter to be non-justiciable.<sup>255</sup>

The first test under *Baker v. Carr* involves direct analysis of the Constitution to determine whether the issue at hand has been “textually committed” to “a coordinate political department.”<sup>256</sup> In applying the first test to the ATL theory, the *American Electric Power* case provides guidance as to the applicability a potential textual commitment by stating that “[e]nvironmental protection is undoubtedly an area ‘within national legislative power,’ one in which federal courts may fill in ‘statutory interstices,’ and, if necessary, even ‘fashion federal law.’”<sup>257</sup> The Clean Air Act was an act of Congress, as authorized by the United States Constitution, but the Constitution does not textually commit the regulation of carbon-dioxide emissions to the federal government. However, one of the stated goals of the ATL theory is to create a global scheme for the reduction of carbon dioxide emissions, which would implicate the foreign powers’ textual commitment to the Executive Branch.<sup>258</sup> Therefore, if the case involved that particular aspect of the theory, then the first test could find the cause of action non-justiciable due to political question.<sup>259</sup> However, the issue of foreign policy is not the end of the discussion because “the mere fact that foreign affairs may be affected by a judicial decision does not implicate abstention.”<sup>260</sup>

The second test presents a dilemma for the judiciary over how to resolve the case due to “a lack of judicial discoverable and manageable standards.”<sup>261</sup> This is distinguishable from *Massachusetts v. EPA*, because that case provided the Court with a federal statute to interpret despite “the Supreme Court stat[ing] that it possessed neither the expertise nor the

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<sup>254</sup> *Barasich*, 467 F. Supp. 2d at 680.

<sup>255</sup> *Id.* at 580.

<sup>256</sup> *Baker*, 369 U.S. at 217.

<sup>257</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2535.

<sup>258</sup> *Supra* note 43.

<sup>259</sup> See generally *Carter v. Goldwater*, 444 U.S. 996 (1979) (discussing the impasse between the Congress and President Carter over the right of the President to nullify a treaty with a foreign power resulted in the case being dismissed out for want of a justiciable issue).

<sup>260</sup> See *Native Village of Kivalina*, 663 F. Supp. 2d at 873 (2009) (citing to *Khouzam v. Attorney Gen. of United States*, 549 F.3d 235, 250 (3rd Cir. 2008)). *Contra Nature’s Trust*, *supra* note 44, at 342 (discussing the need for a “massive global effort” to combat the causes of climate change analogized to the efforts in World War II).

<sup>261</sup> *Barasich*, 467 F. Supp. 2d at 580.

authority to evaluate the policy judgments that EPA offered as justification for refusing to regulate motor vehicle emissions, such as issues involving foreign relations.”<sup>262</sup> The *Comer* court held that the requested relief by the plaintiffs “constitute[d] non-justiciable political questions, because there are no judicially discoverable and manageable standards for resolving the issues presented, and because the case would require the court to make initial policy determinations that have been entrusted to the EPA by Congress.”<sup>263</sup> The *Kivalina* Court cited *Am. Elec. Power Co.* on the presence of judicially discoverable and manageable standards by contending that “[w]ell-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing plaintiffs’ claims and federal courts are competent to deal with these issues” such that their global warming concerns can “be addressed through principled adjudication.”<sup>264</sup> In the ATL context, the court would be able to refer back to the litany of PTD and climate change cases, such as those discussed previously, in order to determine standards for managing the case.

The third prong of the *Baker* test is “the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion.”<sup>265</sup> This step may be the most difficult for a claim under the ATL theory, as the Court may be asked to determine whether the emissions from an individual company are in excess of what reasonable levels are and thus “the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.”<sup>266</sup> The goal of this prong is to respect the balance of powers in the United States’ system of governance by “preventing a court from ‘removing an important policy determination from the Legislature.’”<sup>267</sup> The *Kivalina* Court reasoned that what the Plaintiffs were requesting, despite their denials, was a political judgment “that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming” based solely on the belief that “they are responsible for more of the problem than anyone else in the nation.”<sup>268</sup> The Court in *California v.*

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<sup>262</sup> *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 863 (S.D. Miss. 2012) *aff’d*, 718 F.3d 460 (5th Cir. 2013).

<sup>263</sup> *Id.* at 866.

<sup>264</sup> *Native Village of Kivalina*, 663 F. Supp. 2d at 876 (citing to the Second Circuit Court of Appeals holding in *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 329 (2d Cir. 2009), *rev’d*, *Amer. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011)).

<sup>265</sup> *See supra* note 260.

<sup>266</sup> *Native Village of Kivalina*, 663 F. Supp. 2d at 876 (citing *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005)).

<sup>267</sup> *Id.* (citing to *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 438 F. Supp. 2d 291, 297 (S.D.N.Y. 2006)).

<sup>268</sup> *Id.* at 877.

*General Motors Corp.* reasoned that “[t]he political branches’ actions and deliberate inactions in the area of global warming further highlight this case as one for nonjudicial discretion.”<sup>269</sup> The Court also further reasoned that policy determinations, like those concerning carbon dioxide standards, “lie with the political branches of government, and not with the courts.”<sup>270</sup> Without touching on the issue of displacement by virtue of EPA regulation, as set forth by Congress in the Clean Air Act and recognized in *American Electric Power*, the likelihood of a claim under the theory of ATL surviving a challenge based on justiciability of the issue due to political question can be shown to be very low given the nature of the regulatory scheme as it exists today.

When looking at the three ATL cases that have had an initial hearing, two of the three cases survived because the State Legislature had previously amended the respective constitutions to include a provision for preservation or conservation of the air as a resource for the State.<sup>271</sup> The legislature’s enactment of constitutional amendments permitted the courts to review the cases rather than being forced to dismiss the cases as non-justiciable, which was the result in the third case.<sup>272</sup>

#### C. ADDRESSING CLIMATE CHANGE THROUGH PRIVATE NUISANCE OR POLITICAL ACTION

The discussion in this paper leads to one of two possible solutions for addressing climate change. The first option is to address climate change through private nuisance, as in *Bell v. Cheswick Generating Station*, to remedy an injury caused by climate change for an individual landowner.<sup>273</sup> The second option is to address climate change by seeking political action, such as the addition of air as a resource (this was previously done by the State legislatures in *Bonser-Lain* and *Filippone*).<sup>274</sup> The situation in *Bonser-Lain* and *Filippone* are indicative of the issue facing ATL—as Professor Mary Wood admits—that the end goal of the theory is to promote political

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<sup>269</sup> *California v. Gen. Motors Corp.*, C06-05755 MJJ, 2007 WL 2726871 \*1 (N.D. Cal. Sept. 17, 2007).

<sup>270</sup> *Id.* at \*10 (citing to *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

<sup>271</sup> See generally *Filippone*, 829 N.W.2d at 2; *Bonser-Lain*, 2012 WL 3164561 at \*1. *Contra Brewer* 2013 WL 1091209 at \*3; *Barhaugh*, 361 Mont. at 1.

<sup>272</sup> *Id.*

<sup>273</sup> See *supra* note 117 (discussing that in *Bell*, the plaintiffs sought relief for adverse effects to their property as a result of pollution, in the form of particulate matter being emitted from the neighboring generating station, under a theory of private nuisance).

<sup>274</sup> See *supra* note 271; See also *Nature’s Trust*, *supra* note 44, at 346–47 (discussing efforts to combat climate change on a localized basis much as the Government’s bond drive and conservation efforts were done in World War II).

change.<sup>275</sup> In *Filippone*, the political question issue was avoided because the court was reviewing the district court's ruling on the Iowa Department of Natural Resources' response to the plaintiff's request for rulemaking.<sup>276</sup> This outcome in *Filippone* is useful for illustrating that ATL, in the most basic sense, is an attempt to utilize the courts to engage in action as a result of unfavorable outcomes in the political process.<sup>277</sup> The facts of *Bonser-Lain* and *Brewer* also indicate the same pattern of requesting rulemaking by the State Agency in charge of environmental regulations and once the request is rejected then proceeding to petition for review of that decision.<sup>278</sup> While the courts can be useful for prompting agencies to avoid the dereliction of their statutory or common law duties, the use of the courts to push forward issues that ought to be resolved in the political process is not permitted.<sup>279</sup> Therefore, the best way to combat climate change in a jurisdiction that has not amended the state constitution is to pursue that change and statutorily define the air or atmosphere as a resource that the government must protect for the good of the people.<sup>280</sup> When a party has suffered an injury or will imminently suffer a harm a third party's misconduct, then the court system is the place to seek remedies for that harm, if the burden is sufficiently carried. But the way forward in resolving the climate change dilemma ought not to "require tortured constructions of the present" in seeking to expand the PTD.<sup>281</sup>

#### CONCLUSION

In the search to hold a party responsible for misconduct on the issue of GHG emissions that contribute to title change, a theory has been put forth based on the PTD.<sup>282</sup> The Public Trust is a common law doctrine that holds certain resources, traditionally related to navigable water ways,

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<sup>275</sup> See *supra* note 65 (noting the plan to reduce carbon emissions, but that these options may be outside the scope of the Court's oversight thus questionable under the doctrines of non-judiciability).

<sup>276</sup> *Filippone*, 829 N.W.2d at 1.

<sup>277</sup> *Filippone*, 829 N.W.2d at 1 (citing, "Filippone filed a petition for judicial review on July 21, 2011." The plaintiff filed her petition for judicial review nearly one month after the unfavorable outcome from the Iowa DNR ruled on the request for rulemaking).

<sup>278</sup> See *Bonser-Lain*, 2012 WL 3164561; *Brewer*, 2013 WL 1091209 at \*1-2.

<sup>279</sup> See *supra* note 766; Cf. *Baker*, 369 U.S. at 186; *Native Village of Kivalina*, 663 F. Supp. 2d at 863; *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 863 (S.D. Miss. 2012) *aff'd*, 718 F.3d 460 (5th Cir. 2013); *Am. Elec. Power Co.*, 582 F.3d at 309. *Contra Nature's Trust*, *supra* note 44; *Adjudicating Climate Change*, *supra* note 43.

<sup>280</sup> See *supra* note 267.

<sup>281</sup> See *Massachusetts v. EPA*, 549 U.S. at 497; *Bellon*, 732 F.3d at 1131; See generally *Changing Conceptions*, *supra* note 31; See *supra* note 8.

<sup>282</sup> See generally *Adjudicating Climate Change*, *supra* note 43.

as an asset in trust for the benefit of the “whole of the people” and the government must manage these resources in a responsible fashion to meet that purpose.<sup>283</sup> The ATL theory modifies the public trust beyond the traditional scope to include additional assets, such as the air or atmosphere.<sup>284</sup> Once a sovereign is subject to a fiduciary duty under the trust, the theory would seek to expand responsibility to all the remaining sovereigns.<sup>285</sup>

The potential claims for climate change vary between that of an actual harm<sup>286</sup> to that of an imminent harm from a failure to engage in rulemaking.<sup>287</sup> The theory of harm has also touched on a public nuisance that provides an avenue for relief for a large group of individuals,<sup>288</sup> which could also be in the form of grouped, individualized private nuisance claims, or by entities representing large groups of private citizens.<sup>289</sup> Claims have also started to arise under the ATL theory,<sup>290</sup> but the results have varied based on whether or not the claimants’ jurisdictions had previously provided protection for air quality, the air in general, or even all resources.<sup>291</sup>

While the ATL theory has enjoyed some success thus far, the basic premise of the theory expands the doctrine of Public Trust beyond its traditional scope of navigable water ways by relying on reasoning like a “tortured [construction]” of *Tennessee Copper Co.*<sup>292</sup> The ATL theory also faces potential challenges to meeting the burden of standing<sup>293</sup> and avoiding violating the political question doctrine<sup>294</sup> to find the claim non-justiciable. The way forward based on the issues of pursuing a claim under ATL

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<sup>283</sup> See generally *Ill. Cent. R.R. Co.*, 146 U.S. at 387.

<sup>284</sup> See generally *Adjudicating Climate Change*, *supra* note 43; See also *Nature’s Trust*, *supra* note 44.

<sup>285</sup> *Id.*

<sup>286</sup> See generally *Bell*, 2013 WL 4418637 at \*1.

<sup>287</sup> See *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *Bellon*, 732 F.3d at 1131; *Native Village of Kivalina*; *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 863 (S.D. Miss. 2012) *aff’d*, 718 F.3d 460 (5th Cir. 2013).

<sup>288</sup> See *Bell*, 2013 WL 4418637 at \*1.

<sup>289</sup> See *Am. Elec. Power Co.*, 582 F.3d at 309; *Barasich*, 467 F. Supp. 2d at 676.

<sup>290</sup> See generally *Adjudicating Climate Change*, *supra* note 43; *Nature’s Trust*, *supra* note 44.

<sup>291</sup> See *Alec L.*, 863 F. Supp. 2d at 11; *Bonser-Lain*, 2012 WL 3164561 at \*1; *Filippone*, 829 N.W. 2d at 2; *Kanuk*, 2012 WL 8262431 at \*1. *Contra Brewer*, 2013 WL 1091209 at \*1; *Barhaugh*, 361 Mont. at 1.

<sup>292</sup> See generally *Cool Lawsuits*, *supra* note 51; *Changing Conceptions*, *supra* note 31; *Misuse of Public Nuisance*; See *supra* note 102 (reasoning the right of the State of Georgia to protect harms to their citizens from misconduct by *Tennessee Copper Co.*).

<sup>293</sup> See *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *Lujan*, 504 U.S. at 555; *Bellon*, 732 F.3d at 1131.

<sup>294</sup> See *Am. Elec. Power Co.*, 131 S. Ct. at 2527; *Vieth*, 541 U.S. 267 (2004); *Nixon v. U.S.*, 506 U.S. 224 (1993); *Baker*, 369 U.S. at 186; *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 863 (S.D. Miss. 2012) *aff’d*, 718 F.3d 460 (5th Cir. 2013); *Native Village of Kivalina*, 663 F. Supp. 2d at 863. *Contra California v. Gen. Motors*, 2007 WL 2726871 at \*1 (N.D. Cal. 2007).



should be remedied by separating claims into (1) a private nuisance action, (2) a claim for denial of rulemaking where the state has provided a duty to protect air as a resource, or (3) political action to have that right provided.<sup>295</sup>

We think of our land and water and human resources not as static and sterile possessions but as life giving assets to be directed by wise provisions for future days. We seek to use our natural resources not as a thing apart but as something that is interwoven with industry, labor, finance, taxation, agriculture, homes, recreation, good citizenship.

Franklin D. Roosevelt<sup>296</sup>

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<sup>295</sup> See *Bell*, 2013 WL 4418637 at \*1; *Filippone*, 829 N.W.2d at 2; *Bonser-Lain*, 2012 WL 3164561 at \*1. *Contra Alec L.*, 863 F. Supp. 2d at 11; *Brewer* 2013 WL 1091209 at \*3; *Barhaugh*, 361 Mont. at 1; See also Caroline Cress, Comment, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C.L. Rev. 236 (2013) (noting other rationales for why ATL faces an uphill battle in implementation of the theory).

<sup>296</sup> BYRON W. DAYNES & GLEN SUSSMAN, WHITE HOUSE POLITICS AND THE ENVIRONMENT 30 (2010), available at <http://books.google.com/books?id=HIOQ1FYHtcYC&pg=PA30#v=onepage>.